BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended; AND IN THE MATTER OF the complaint by Dawn Metsala dated March 9, 1993, alleging discrimination in employment on the basis of handicap.

B E T W E E N:

Ontario Human Rights Commission

-and-

Dawn Metsala

Complainant

-and-

Falconbridge Limited, Kidd Creek Division

Respondent

DECISION

Adjudicator: Mary Anne McKellar

Date: February 8, 2001

Board File No.: BI-0210-99

Decision No.: 01-005

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Jennifer Scott, Counsel
Dawn Metsala, Complainant	)	for herself
Falconbridge Limited, Respondent	)	Jim Simmons, Counsel

INTRODUCTION

This decision deals with a complaint dated March 9, 1993 ("the Complaint"), in which Dawn Metsala ("the Complainant") alleges that the Respondent Falconbridge Limited (Kidd Creek Division) ("Falconbridge") unlawfully discriminated against her in her employment on the basis of handicap. The sections of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*") alleged to have been contravened are ss. 5(1) and 9.

THE ISSUE

The case focused primarily on the issue of whether Falconbridge took adequate steps to accommodate the Complainant's return to work following a period of medical leave.

DECISION

Falconbridge contravened the *Code* when it failed to return the Complainant to work in accordance with her medical restrictions on or about June 30, 1992. The Board's remedial orders in respect of this contravention are found at the end of this decision.

THE FACTS

This recitation of facts is based on the testimony of three witnesses called by the Commission: Dawn Metsala, Dr. Dave Huggins, and Julie Berlingeri. Falconbridge called five witnesses: Carol Dunn, George Rodda, Dennis O'Hare, Anne MacGregor, and Pat Murphy.

The Complainant grew up in Timmins, Ontario. After completing high school, she undertook two years of training as a nurse's aide in Toronto. She then returned to Timmins and commenced working for Falconbridge as a steno-clerk on February 1, 1972.

Falconbridge is the largest employer in the Timmins area. In 1992, it employed approximately 2400 persons. As the Board understands it, Falconbridge's Timmins operations involve both mining ore (the mine site) and refining the ore to extract the precious metals (the metallurgical site).

During her employment with Falconbridge, the Complainant always worked out of the metallurgical site, and until December 1989, always performed clerical duties in an office-type environment. Following her initial employment as a steno-clerk in the zinc cell house, she was promoted to the position of planning clerk in November 1975. On May 4, 1988, she obtained a position as payroll clerk.

The Complainant testified that the payroll clerk's job involved a fair bit of overtime work and pressure to complete tasks in accordance with inflexible deadlines. Falconbridge's witnesses agreed with this characterization of the job. In early December 1989, the Complainant approached Carol Dunn, a human resources representative. The Complainant indicated that she was experiencing stress related to her job and asking to be transferred. Dunn recalled suggesting that the Complainant speak to her supervisor. The Complainant recalled Dunn advising her that she would have to wait for a vacant job to be posted and that Dunn would keep an eye out for one. The Complainant did not speak to her supervisor and no job was posted prior to her commencement of disability leave on December 11, 1989. She did not return to full-time work until December 6, 1993.

Dr. Huggins, the Complainant's family physician diagnosed her as suffering from reactive depression. He treated her throughout the period of her disability leave. Additionally, she saw other specialists from time to time, one of whom diagnosed her as suffering from chronic fatigue syndrome. Her symptoms included fatigue, confusion, poor recall and an inability to concentrate.

Under the terms of her employment with Falconbridge, the Complainant's income as fully replaced during the first six months of her leave by benefits from the short-term disability plan. Benefits under this plan are not provided through an insurance carrier: rather Falconbridge self-funds them. At the end of that six-month period, the source and level of the Complainant's income replacement benefits changed. For the next two years, long-term disability benefits equivalent to 66% of her salary were provided by an outside insurer. Pursuant to that plan, the eligibility criteria change after an employee has been in receipt of long-term disability benefits for two years. Although initial eligibility for benefits is dependent on an employee's unfitness to perform her own job, continued eligibility is dependent on her unfitness to perform any job. Although she commenced an unsuccessful appeal of the insurance company's decision, the Complainant's long-term disability benefits were cut off effective June 30, 1992.

As noted above, during the course of her leave the Complainant had been attended by Dr. Huggins, and had additionally consulted various medical specialists. Dr. Huggins, grew up in Timmins, and, following the completion of his medical studies, returned there to practice. Many of his patients were Falconbridge employees, and he claimed to have a good working relationship with George Rodda, Falconbridge's supervisor of occupational health and rehabilitation services.

Dr. Huggins completed a Certificate of Fitness in respect of the Complainant on June 26, 1992. This pre-printed form is prepared by Falconbridge and provides spaces for information to be filled in by the medical practitioner. The certificate completed by Dr. Huggins indicates that he treated the Complainant for a non-occupational illness and last saw her on June 26, 1992. In the space where Dr. Huggins was to indicate whether the Complainant was fit for her regular job, he checked the box "No". Although space was provided in this section of the form, he did not indicate when the Complainant might be available for her regular duties, nor did he indicate how long a period of time she might work with limitations. Under the heading, "Work restrictions: this patient has the following limitations", he wrote, "Recommend ½ day, non-intense office work - - if available".

The Complainant provided the Certificate of Fitness to Rodda. Her testimony, which was not challenged on cross-examination, was that she advised him that the restrictions were temporary and she anticipated that they would be applicable for no more than four weeks. The Complainant also called Rodda several times over the next two weeks to inquire about her reinstatement. After he requested that she not call him further and advised that he was aware of her situation, she ceased calling. No one from Falconbridge ever contacted the Complainant about a return to work in accordance with these restrictions. Nor did anyone call either the Complainant or her physician to seek clarification of what the restrictions meant, or indeed, whether they had changed.

Rodda has a nursing background. At the time of the hearing he had worked for Falconbridge for 20 years. During the time period covered by the Complainant's medical leave and subsequent return to work, Rodda's title was Rehabilitation Supervisor. His responsibilities involved working closely with the human resources department to identify upcoming job vacancies and to attempt to match the requirements of those jobs with the skills and any medical restrictions of various employees on medical leave due to illness or injury in an attempt to return them to the active workforce.

Dunn testified that the process of placing and accommodating disabled workers was an exercise in teamwork and cooperation, involving the human resources department, Rodda, and the departments where the workers might be placed. Rodda described his usual practice in attempting to accommodate disabled workers with restrictions. It appears that the following practice was followed with respect to employees in receipt of long-term disability benefits, or whose benefits had expired. As noted below, the practice differed somewhat for employees in receipt of short-term disability benefits. Upon receipt of medical restrictions from an employees' physician, Rodda would contact the employee's former department to determine if there was a job available there that met the restrictions. If no job in that department met the employee's restrictions, then Rodda would look elsewhere in the plant for such a job. Rodda had no authority and no budget to modify existing jobs or to create different ones – his role was

simply to attempt to match workers and their restrictions to existing jobs. At that point, as the Board understood it, if a vacancy existed, the employee might be placed in an appropriate existing job.

With respect to the placement of disabled workers in receipt of short-term disability benefits, Falconbridge's practice was somewhat different. There were numerous examples in the evidence before the Board of situations in which disabled miners in receipt of such benefits were placed in clerical positions for which they had no experience or skills. Dunn and Rodda explained that these workers were so placed because Falconbridge was paying them whether they were at work or in receipt of Falconbridge's self-funded short-term disability benefits. According to Dunn, there was no mechanism in place at Falconbridge for considering accommodation of employees prior to their claiming short-term disability benefits, because no disability had been identified at that point

All of the witnesses called by Falconbridge stated that the company was in the process of downsizing its staff in 1992 and 1993, and that the complement of clerical staff was hardest hit by the downsizing. The downsizing was accomplished largely through attrition and voluntary severance packages. Only one full-time clerical position was posted between the end of June 1992 and the end of December 1993, and it was the position that the Complainant ended up filling. No evidence was led respecting the number of clerical positions eliminated as a result of attrition and voluntary severance.

Between late May 1992 and early December 1993, five clerical positions were filled on a contract basis by former employees of Falconbridge. As the Board understands the process, the department wishing to enter into a contract for clerical services would complete a contract requisition, specifying the term of the contract, the hours of work, the position title, and the name of the recommended contractor and forward it to the purchasing department for approval. As Dunn testified, the contracts were widely used during periods of downsizing, which all acknowledged was occurring in 1992-93, because they provided some flexibility during staffing transitions. The

contracts did not create employment relationships, and Falconbridge could specify their duration and could choose to fill them on a part-time or full-time basis and could and did renew them as necessary. Some of the contract requisitions were unavailable, but the ones filed in evidence included only cursory descriptions of the work to be performed or the skills and qualifications required. One of them indicated that MacIntosh experience and knowledge of Kidd Creek clerical procedures was required, while another indicated only that clerical functions were to be performed. Some, but not all, of these contracts came to the attention of Rodda. Consequently, the Complainant's fitness to perform the services required by them was largely not assessed by Rodda, with the exceptions noted in the paragraph below. Most, if not all, of the contracts were filled by former Falconbridge employees. Two of them in particular, Andrea Toner and Joanne Dionne, were former steno clerks who had been terminated by Falconbridge in 1986. With the possible exception of the one-month period between mid-June and mid-July 1993, there was always at least one clerical position filled on a contract basis.

Two of the contract positions that Rodda was aware of during the time that the Complainant was awaiting placement were production clerk positions. He testified that he did not think these positions would have been appropriate for the Complainant because he had been told that she did not possess the required computer skills; he knew she had no experience in the production plant areas of the metallurgical site and would require training; and he thought the jobs would be too stressful. All of these conclusions were reached without benefit of any discussion with the Complainant or her doctor.

In late fall 1993, the Complainant became aware through her husband that Julie Berlingeri, the full-time production clerk in the copper refinery, would be moving away from Timmins and that her position might be available. No one from Falconbridge contacted the Complainant respecting her suitability for this job prior to posting it. It was the first clerical position to be posted since July 1992. When the job was posted, the Complainant applied. In all, six candidates competed for the job. The Complainant was the senior candidate. Although she was not the preferred candidate of the committee assessing the applicants, at the insistence of the human resources department the

Complainant did obtain the job. O'Hare, Falconbridge's Superintendent of Human Resources from 1982-95, testified that the Complainant would not have secured this position as the superior candidate, but that his department compelled her selection over the opposition of copper refinery personnel because she was a Falconbridge employee, she possessed the basic skills to perform the job, and they had an obligation to accommodate her, which justified the training that she would require as compared to the preferred candidate.

The Complainant commenced working full-time as a production clerk in the copper refinery on December 6, 1993, at one step below full salary on the understanding that she would receive full salary following the satisfactory completion of a 6-month probation period. The Complainant testified that she was never asked whether she had a need for accommodation at this time, nor was she offered any accommodation. She testified that she found the return to work quite tiring initially and that it was particularly difficult to concentrate in the afternoons.

Berlingeri, who trained the Complainant in many aspects of the production clerk's duties also testified that the Complainant appeared to be exhausted at the end of the day. Nevertheless she attended work regularly and Berlingeri found her work to be satisfactory. Additionally, all of the Complainant's performance evaluations during this time period were satisfactory and she received her full salary after the completion of the six-month probationary period. Both O'Hare and Dunn testified that she must have been performing satisfactorily to have received the salary upgrade. More tellingly, so did her immediate supervisor in the copper refinery, Pat Murphy. Because of the opposition within the copper refinery to the Complainant's obtaining the position, human resources decided to monitor the situation closely and the record revealed that informal questioning respecting the Complainant's work and training always indicated that she was progressing well. The Complainant worked full-time as a production clerk in the copper refinery for 4 ½ years and then obtained a lateral transfer to the position of production clerk in the zinc service area, a position she continued to occupy at the time of the hearing.

Falconbridge attempted to establish that the Complainant did not satisfactorily perform her duties in the copper refinery. As this evidence was not persuasive, it will be summarized only briefly. The production clerk in the copper refinery at the time also functioned as a back-up for the shipping clerk when the latter was away due to illness or vacation. In this aspect of her job, the Complainant was trained by Anne MacGregor, the permanent full-time shipping clerk. MacGregor was part of the interview committee that strongly preferred another candidate to the Complainant, and after the Complainant obtained the position, she wrote to human resources setting out her concerns about the process and the Complainant's ability to perform the job. Notwithstanding that the documentary trail of formal evaluations of the Complainant's work was uniformly positive, MacGregor suggested that she was slow to learn the shipping clerk's functions, required much assistance in performing them, and made a number of mistakes. MacGregor also indicated that she strongly resented the Complainant, who performed the duties of both production clerk and shipping clerk while MacGregor was away on a stress leave, and then remained in those positions while MacGregor was returned following her leave to a position she "hated" in the smelter. MacGregor stated that she felt she had "been displaced to accommodate Dawn". MacGregor was also clearly upset that her supervisors were not receptive to her complaints about the Complainant's work. In these circumstances, the Board declines to give MacGregor's evidence respecting the adequacy of the Complainant's job performance any weight.

From the termination of her long-term disability benefits at the end of June 1992 until December 6, 1993, the Complainant received no income replacement benefits of any kind, nor did she earn income from any other source. She continued to be an employee of Falconbridge, however, and to receive certain health and welfare benefits. As a consequence of the termination of long-term disability benefits, she ceased accruing service recognition credits as of June 30, 1992 and did not recommence accruing those credits until December 6, 1993. There was a dispute as to whether the Complainant also lost the opportunity to earn certain RRSP service awards during this period. The

Complainant testified that she had lost the opportunity, but Dunn did not think that this was the case.

The Complainant did not look for full-time work elsewhere between July 1, 1992 and December 6, 1993. She testified that she did not do so because she did not want to terminate her employment at Falconbridge, where her significant service recognition credits entitled her to enhanced vacation benefits and made her eligible for other service awards. The Complainant also testified that she had high service recognition as compared to other clerical staff. She stated that Falconbridge was the largest employer in the Timmins area and that the only comparably paid clerical positions that might have been available were in government, but those jobs required bilingual competencies she did not possess.

THE ANALYSIS

Section 5(1) of the *Code* guarantees to every person the right to equal treatment in employment without discrimination because of, *inter alia*, handicap:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

Section 9 of the Code prohibits the infringement of, *inter alia*, s. 5(1):

> No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Section 10(1) of the Code provides a definition of "handicap":

> "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental retardation or impairment,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the Workers' Compensation Act;

There was no dispute that the Complainant and Falconbridge were in a relationship of employee and employer at all material times.

Falconbridge did not dispute that the Complainant's diagnosis as suffering from reactive depression was *bona fide*. Similarly, it did not dispute that her condition constituted a handicap under the *Code*. Additionally, there is no doubt that Falconbridge was aware of the Complainant's diagnosis and the reason for her medical leave. Indeed, it would have been difficult for Falconbridge to have justified either position having regard to its determination that the Complainant was entitled to medical leave and short-term disability benefits under its self-funded and administered plan. In any event, the Canadian Human Rights Tribunal in *Boucher v Canada (Correctional Services)* (1988), 9 C.H.R.R. D/4910 found that an employee suffering from nervous depression had a disability, and the Board in *Chamberlain v. 599273 Ontario Ltd.* (1990), 11 C.H.R.R. D/110, concluded as follows:

> . . . adjustment disorder with depressed mood, is a mental disorder and thus a handicap under the *Code*. (at paragraph 37)

The Board finds that the reactive depression and chronic fatigue syndrome from which the Complainant suffered constitute a handicap under the *Code*.

With respect to the issue of whether the Complainant was treated unequally because of her handicap contrary to s. 5(1) of the *Code*, the Commission submitted that the Board needed to look at the whole of her treatment from the fall of 1989 until her return to work in December 1993. The Commission submitted that Falconbridge had treated the Complainant unequally vis-à-vis other employees in four distinct ways:

(i) in its failure to accommodate her request for a transfer or modified duties in early December, 1989;

(ii) in its failure to consider her for contract work between July 1992 and December 1993;

(iii) in its failure to consider her for general clerical duties during the same period; and

(iv) in requiring her to compete for the position of production clerk in the copper refinery.

It is worth noting that the Commission did not challenge Falconbridge's corporate practices respecting the accommodation of workers with disabilities, but merely its actions with respect to the application of those practices to the Complainant. The only evidence on the issue of accommodation prior to medical leave was Dunn's testimony that Falconbridge did not accommodate workers with medical restrictions until the nature of those medical restrictions had been identified by the worker's application for short-term disability benefits. It seems to the Board that the dictates of the *Code* contemplate a more proactive approach on the part of employers to the early identification of disabilities and the need for accommodation. In view, however, of the fact that the corporate practices were not challenged, and the Complainant appeared to have been treated in accordance with them prior to commencing her medical leave, the Board cannot find that the Complainant was treated unequally when her 1989 request for a transfer or modified duties was refused.

There is no doubt, however, that the Complainant was treated unequally vis-à-vis other employees when she was not provided with contract work or general clerical duties from June 1992 to December 1993 and was required to compete for the position of Production Clerk in December 1993. In the Board's view, the Complainant was treated differently as compared to other employees with medical restrictions because of the assumptions Falconbridge made about the effects of her particular handicap, a mental disorder, and because of their failure to make the appropriate inquiries to gather accurate information. Rodda acknowledged that it was more difficult to ascertain when an employee had sufficiently recovered and was capable of returning to work after suffering from a mental disorder like depression as compared to a physical illness or injury. In

those circumstances it was even more incumbent on him to make inquiries and not to act on the basis of assumptions and stereotypes.

Falconbridge's failure to consider the Complainant for contract clerical work, for general clerical duties, or for medical placement into the Production Clerk position constitutes a *prima facie* case of direct discrimination on the basis of disability contrary to s. 5(1) and s. 9 of the *Code*.

The Commission submitted that the only defence available to Falconbridge is found in s. 17(1) of the *Code*, and relied on the Board's decision in *Entrop v. Imperial Oil (No. 6)* (1995), 23 C.H.R.R. D/196 in support of that assertion. Subsequent to the close of argument, however, the Ontario Court of Appeal released its decision in *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18, in which it commented on the availability of defences other than s. 17. A brief discussion of the Court of Appeal's decision is in order.

The Court of Appeal's analysis in *Entrop* relied on two Supreme Court of Canada decisions dealing with the British Columbia *Human Rights Code*: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 ("*Meiorin*"); and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"). Both *Meiroin* and *Grismer* dealt with allegations of discrimination based on the effect of the application of eligibility criteria to individuals where those eligibility criteria disentitled them to advantages they had previously enjoyed. In *Meiorin*, the grievor was a female firefighter who failed to satisfy new physical requirements for that position, which were found to exceed the physiological capacity of most women. In *Grismer*, the complainant's motor vehicle license was cancelled when his medical condition precluded him from satisfying minimum field of vision requirements. The issue in both cases was the application of rules or practices that failed to take account of individual circumstances. In *Meiorin*, the Court rejected the traditional human rights analysis that distinguished between "direct"

and "indirect" discrimination in favour of what it called a "unified approach", and then articulated a three-step test that an employer must satisfy to justify a *prima facie* discriminatory workplace rule or standard.

The Court of Appeal applied the unified approach to the facts of *Entrop*, which involved a challenge to Imperial Oil's alcohol and drug testing policy requiring employees in safety-sensitive positions to disclose previous substance-abuse problems. The consequence of this approach, for the purposes of this case, is that the Court held that Imperial Oil could rely on both s. 11 and s. 17 in defence of its *prima facie* discriminatory actions, and that both defences had to be assessed using the three-step justification developed under the unified approach. The Court of Appeal's analysis was somewhat surprising, to say the least, given that the British Columbia *Code* contains language very different from that found in the *Code*'s s. 11, and has no provision equivalent to the *Code*'s s. 17. Having determined in *Entrop* that s. 11 and s. 17 should be conflated and the question of whether either defence was made out answered by application of the new three-step test in *Meiorin* (see Paragraph 85), however, the Court also said:

> Third, though the language of s. 11 does reflect the distinction between direct and adverse effect discrimination – because it provides a BFOR defence "where a requirement ...exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by [a] prohibited ground of discrimination" – I would limit the situations to which s. 11 does not apply to those few cases that can be "neatly characterized" as cases of direct discrimination. I have in mind the kinds of cases referred by McIntyre J. in Ontario v. Simpson-Sears, supra – "No Catholics or no women or no blacks are employed here" – where the requirement expressly includes a prohibited ground of discrimination. (at Paragraph 80)

In this case, the alleged *Code* contravention does not arise from Falconbridge's application of a rule or standard or policy to the Complainant without taking account of her individual circumstances. Rather, it is Falconbridge's failure to apply the same practices to her as it did to other disabled workers in need of accommodation that is the crux of the Complaint. On the Board's analysis, *Meiorin*, *Grismer* and *Entrop* have no

application to the facts of this case, which can be neatly characterized as one of direct discrimination. The Board agrees with the Commission's submission that the only defence available to Falconbridge is that found in s. 17 of the *Code*.

> 17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.
>
> (2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

The right the Complainant was entitled to exercise was that of being returned to Falconbridge's active workforce. Falconbridge can only exculpate itself for having failed to do so between June 30, 1992 and December 6, 1993 if it has demonstrated on the evidence before the Board: (1) that she could not have performed the essential duties or requirements of the contract positions or general clerical duties; and (2) that to have returned her to work in either capacity would have constituted undue hardship to it on the basis of the considerations listed in s. 17(2).

Following its receipt of the Complainant's Certificate of Fitness at the end of June 1992, Falconbridge took no steps to ascertain the true nature of her medical condition or to clarify the nature of her restrictions although it was clearly its obligation to do so:

> When an employer receives a medical clearance from a physician, even though it is very surprising given the past medical history and even though it is cryptic in form and out-line as in the instant situation, the employer has a duty to inquire of that physician as to the reality of the situation, before rejecting the clearance, and hence, the employee.
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> *Belliveau v. Steel Co. of Canada* (1988), 9 C.H.R.R. D/5250 (Ont. Bd. Inq.) at Paragraph 39619

The Commission submits that because Falconbridge either failed to consider the Complainant for the contract positions or assumed that they would be too stressful for her without ascertaining if that were so, it cannot prove that the Complainant was unable to fulfill the essential duties of these positions. Similarly, it is unable to prove that she was

unable to fulfill the essential duties of general clerical work because she was not even considered for such duties. As a consequence, the Commission submits that Falconbridge cannot rely on s. 17 of the *Code*. It relies on *Allan v. Singh* (1993), 22 C.H.R.R. D/5250 (Ont. Bd. Inq.) in support of this submission:

> Dr. Singh has established that Theresa Allan was denied employment for the reason only that he believed she was incapable of performing the essential duties of the job of receptionist/secretary. As noted above, Dr. Singh has not established that Theresa Allan was actually incapable of performing the receptionist job. Hence, Dr. Singh has not established a s. 17 defence, and he is liable for his breach of ss. 5 and 9 of the Code. (at Paragraph 30, emphasis in original)

Falconbridge did not address the above argument in its submissions. The Board agrees with the Commission's analysis. Falconbridge was obliged to ascertain the Complainant's medical condition and the Complainant was obliged to cooperate in any inquiries Falconbridge made. Having failed to look beyond the Certificate of Fitness, which clearly indicated that the Complainant could be returned with some restrictions and more importantly did not clearly and unequivocally indicate her unsuitability for the contract positions or for general clerical work, Falconbridge has failed to establish that it had an objective basis for concluding that she was incapable of fulfilling the duties associated with that work in June 1992 and remained so until December 1993. Falconbridge cannot therefore rely on the s. 17(1) defence.

Even if the s. 17(1) defence were available to Falconbridge, it led no evidence on which the Board might conclude that it could not have accommodated the Complainant short of undue hardship as contemplated by s. 17 (2). There was no evidence or argument whatsoever pertaining to outside sources of funding or to health and safety considerations.

The only evidence led with respect to the cost of accommodation was that Falconbridge was in a period of downsizing in 1992 and 1993 and that the rehabilitation department had no budget to create positions. The only argument led with respect to Falconbridge's duty and ability to accommodate was that the duty to accommodate did

not require it to "create" a position. Because the contract positions she might have performed were existing work assignments filled by other's, Falconbridge's argument on this point could only possibly relate to offering general clerical work to the Complainant. The general clerical work, as noted above, had been offered to disabled workers in receipt of short-term disability benefits on numerous occasions. Even if the *Code* could not oblige an employer to "create" positions to accommodate disabled workers, its undertaking to do so in some cases exposes to scrutiny its decision not to do so in others. The standard of that scrutiny is whether the extension of the practice to the employee in question would constitute undue hardship for the employer. Falconbridge failed to demonstrate on the evidence what costs it might have incurred in connection with the assignment of general clerical duties. It cannot therefore reasonably assert that those costs would amount to undue hardship.

Falconbridge's Counsel resisted the Commission's attempt to introduce the company's annual report and statement of profit even though based on audited financial statements. Notwithstanding that the documents in question constitute business records, he took the position that their introduction in cross-examination of Falconbridge's final witness would entitle it to an adjournment in order to call an additional witness involved in their preparation. In view of Falconbridge's position, the Commission decided not to seek to introduce the reports. From Falconbridge's refusal, the Board takes the adverse inference that the documentation in question would have demonstrated that, even had Falconbridge assigned the Complainant to general clerical work for the entire period of June 1992 until December 1993, and even if, as it asserted but did not prove, that work had no value to the company, Falconbridge could still have afforded to pay her annual salary without approaching undue hardship having regard to its earnings. On this point, the Board notes Rodda's evidence that it was very unusual for a Falconbridge employee to exhaust all income replacement benefits and still not be returned to work. There were, in other words, very few employees in the situation of the Complainant such that the cumulative costs of accommodating them would potentially approach undue hardship.

Falconbridge argued that it had accommodated the Complainant by awarding her the position of production clerk in the copper refinery in December 1993 when she was clearly not the best candidate for the position. It then attempted to lead evidence from which the Board might conclude that she did not perform well in that position. The Board has already refused to reach such conclusion on the evidence, and is in any event somewhat puzzled by Falconbridge's reliance on it. Falconbridge's obligation to accommodate the Complainant by undertaking efforts to return her to work commenced when it was provided with the Certificate of Fitness in June 1992. This case is not about whether Falconbridge accommodated the Complainant in December 1993, but whether it failed to do so from June 1992 until December 1993.

On the totality of the evidence, it is undisputed that Falconbridge took the position that the Complainant would have to wait for a vacant position for which she was qualified to arise. That is not accommodation. Falconbridge did not consider any accommodative measures whatsoever during this period. That fact in and of itself constitutes evidence of a failure to accommodate. See *Marzano v. Nathar Ltd.* (1992), 18 C.H.R.R. D/248 (Ont. Bd. Inq.), at paragraph 33. As the Commission correctly pointed out, the duty to accommodate requires an employer to do more than merely investigate whether an employee can perform an existing job:

> The duty to accommodate goes beyond investigating whether an employee can perform an existing job – it involves investigating whether something can be done to existing jobs to enable the employee to perform a job.
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> *Re Calgary District Hospital Group and U.N.A., Loc. 121-R* (1994), 41 L.A.C. (4th) 319 (Ponak), at p. 326.

The Board finds that Falconbridge has contravened sections 5(1) and 9 of the *Code* by discriminating against the Complainant on the basis of handicap.

REMEDY

The Commission seeks to have the Board award damages in respect of lost wages to the Complainant calculated on a full-time basis at a Code 4 level from July 1, 1992

until December 6, 1993. The Commission also seeks to have the Board award pre-judgment interest on that amount from the date of the Complaint, at a rate of 8.3% *per annum*. In its written submissions, the Commission identified the date of the Complaint as March 15, 1993. In fact, the Complaint is dated March 9, 1993.

The Commission takes the position that a duty to mitigate does not arise in the circumstances of this case where the Complainant remained an employee of Falconbridge. The Commission cited no authority for this position. The Board does not need to decide it, because it agrees with the Commission that even if a duty to mitigate does arise, Falconbridge has not satisfied the onus of establishing that the Complainant would have secured alternate employment. See *Gohm v. Domtar Inc. (No. 4)* (1990), 12 C.H.R.R. D/161, at paragraph 131. Indeed, Falconbridge led no evidence whatsoever on this issue. Falconbridge also did not dispute the claim for pre-judgment interest or the basis of its calculation.

Falconbridge did dispute that the measure of any lost wages should be based on a full-time salary, having regard to the Complainant's medical restrictions. The Certificate of Fitness recommended the Complainant's return to work on a half-time basis. Because Falconbridge did not seek to clarify these restrictions, and Dr. Huggins understandably could not recall some eight years later how long he may have contemplated the restrictions continuing, the only evidence on this point is the Complainant's. She testified that she thought the restrictions might apply for two weeks to a month. Accordingly, the Complainant's wage losses should be calculated as if she had worked half-time for the first two weeks of July. Those wage losses are to be calculated on the basis of the full-time Code 4 salary rate applicable throughout the period in question. Pre-judgement interest on the total amount so determined is to be calculated at the rate of 8.3% per annum from March 9, 1993.

The Commission sought to have the Board order that the Complainant is entitled to service recognition credits (seniority) for the period from July 1, 1992 to December 6, 1993. The Board so orders.

The Commission sought to have the Board order that the Complainant is entitled to RRSP service awards from July 1, 1992 until December 6, 1993. The Board recalls that there was some dispute in the evidence as to whether the Complainant had in fact received these service awards. If she did not, the Board orders that she is entitled to them.

The Commission sought to have the Board award to the Complainant general damages in the amount of $10,000.00, and to award pre-judgment interest on that amount calculated from March 9, 1993 at the rate of 8.3% *per annum*. Falconbridge's counsel took the position that an award of general damages was not appropriate, and did not suggest an alternative amount. An award of general damages in respect of the Complainant's loss of the right to be free from discrimination generally flows whenever a complaint under the *Code* is upheld. In *Moffatt v. Kinark Child and Family Services* (1999), 36 C.H.R.R. D/346, the Board held that such awards of general damages cannot exceed $10,000.00. $10,000.00 awards have generally been reserved for the most egregious cases. In *The Shelter Corporation et al v. Ontario (Human Rights Commission) et al*, (unreported decision dated February 2, 2001), the Divisional Court stated that "there is no ceiling on the amount of general damages" (at paragraph 43). Having regard to these authorities and the circumstances of this case, which the Board finds to be truly egregious in that Falconbridge essentially made no efforts whatsoever to return a 21-year employee to the active workforce, the Board awards $10,000.00 in general damages. This amount is inclusive of pre-judgment interest.

The Board remains seized with respect to the calculation of damages.

Dated at Toronto, Ontario this 8th day of February, 2001.

Mary Anne McKellar, Vice-Chair